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10/689,397	10/20/2003	Ronald R. Weiss	GME / 131C	2876
26875 7590 09/21/2007 WOOD, HERRON & EVANS, LLP 2700 CAREW TOWER 441 VINE STREET CINCINNATI, OH 45202			EXAMINER BECKER, DREW E	
			ART UNIT 1761	PAPER NUMBER
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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/689,397
Filing Date: October 20, 2003
Appellant(s): WEISS, RONALD R.

**MAILED
SEP 21 2007
GROUP 1700**

David Brinkman
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 22, 2007 appealing from the Office action mailed April 26, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct.

WITHDRAWN REJECTIONS

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The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner: the obviousness-type double patenting rejections of claims 26-29 over Pat. No. 6,534,103 and Pat. No. 6,352,731.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

4,182,229	VANDEWALKER	1-1980
5,352,866	CARTWRIGHT et al	10-1994

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 26-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over VandeWalker [Pat. No. 4,182,229] in view of Cartwright et al [Pat. No. 5,352,866].

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VandeWalker teaches a method of popping corn by heating a kettle according to a first cold-start temperature without PID control by starting from ambient temperature and popping an initial batch of corn (column 6, lines 14-35), maintaining the kettle at 300°F between batches (column 5, line 53), heating the kettle according to a second control wherein the starting temperature is 300°F (column 5, line 61), the first and second algorithms inherently having maximum temperatures, and the maximum temperatures varying between 390-425°F (column 5, line 66). VandeWalker does not specifically recite the first temperature being greater than the second temperature, or the use of PID control in subsequent batches. It would have been obvious to one of ordinary skill in the art to use a higher temperature for the first batch of VandeWalker since this would have been done during the course of normal experimentation and optimization due to such factors as different types of popcorn and oil, since VandeWalker teaches that a higher temperature reduces the cooking time (column 5, line 65 to column 6, line 2), and since VandeWalker teaches that varying the cooking temperature will be done according to the desires of each individual user (column 6, line 5). Cartwright et al teach a method of maintaining the temperature of a frying kettle via proportional, integral and derivative (PID) control (column 8, line 22). It would have been obvious to one of ordinary skill in the art to incorporate the PID temperature maintenance of Cartwright et al into the invention of VandeWalker since both are directed to methods of cooking food in a kettle with oil, since VandeWalker already required a separate means for maintaining the kettle temperature between batches (column 5, lines 47-67), since Cartwright et al teach that PID control was more accurate and repeatable than previous methods of

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temperature control (column 2, line 25), Cartwright et al disclose that conventional heater controls were effective to quickly raise the oil temperature to a predetermined value (column 1, line 61), since the conventional heating control of VandeWalker reached the desired cooking temperature faster than PID control due to the requirement of PID control to reduce the heating rate as it approached the cooking temperature (column 9, lines 20; Figure 8), and since conventional control of the initial “warm-up” batch would have eliminated the need to wait and perform the diagnostic and other more complicated start-up procedures of Cartwright et al before the apparatus could be used (column 6, line 61 to column 7, line 3) thus reducing the wait time for the first batch of popcorn in VandeWalker.

(10) Response to Argument

Appellant's Arguments A and B

] The obviousness-type double patenting rejections relating to Pat. No. 6,534,103 and Pat. No. 6,352,731 have been withdrawn by the examiner and no longer apply to the pending claims.

Appellant's Argument C

Appellant argues that the examiner did not perform a traditional “teaching, suggestion, or motivation” (TSM) test. However, according to the Supreme Court, the TSM test is only one of number of valid rationales that can be used to determine obviousness. It is not the only rationale that may be relied upon to support a conclusion

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of obviousness. The claim would have been obvious because the substitution of one known element for another would have yielded predictable results to one of ordinary skill in the art at the time of the invention. *KSR International Co. v. Teleflex Inc.*, 550 U.S., 82 USPQ2d 1385 (2007).

In response to appellant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, VandeWalker is directed to a conventional method for controlling a popcorn kettle which uses a simple temperature sensor or TRIAC (column 5, lines 47 to column 6, line 13) while Cartwright et al is directed to a more advanced method for controlling and maintaining oil temperature which uses PID control (column 9, lines 20; Figure 8). The conventional method of VandeWalker has the advantages of simpler operation and faster heating times due to its simple on/off heater control, while the PID method of Cartwright et al had the advantages of eliminating temperature overshoot and providing more accurate and repeatable temperature control than previous methods (column 2, line 25). Cartwright et al also disclose that conventional heater controls were effective to quickly raise the oil temperature to a predetermined value (column 1, line 61). It would have been obvious to one of ordinary skill in the art to incorporate the PID temperature

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maintenance of Cartwright et al into the invention of VandeWalker since both are directed to methods of cooking food in a kettle with oil, since VandeWalker already required a separate means for maintaining the kettle temperature between batches (column 5, lines 47-67), since Cartwright et al teach that PID control was more accurate and repeatable than previous methods of temperature control (column 2, line 25), Cartwright et al disclose that conventional heater controls were effective to quickly raise the oil temperature to a predetermined value (column 1, line 61), since the conventional heating control of VandeWalker reached the desired cooking temperature faster than PID control due to the requirement of PID control to reduce the heating rate as it approached the cooking temperature (column 9, lines 20; Figure 8), and since conventional control of the initial "warm-up" batch would have eliminated the need to wait and perform the diagnostic and other more complicated start-up procedures of Cartwright et al before the apparatus could be used (column 6, line 61 to column 7, line 3) thus reducing the wait time for the first batch of popcorn in VandeWalker.

In response to applicant's argument that neither reference teaches both control methods, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

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In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).


(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Drew Becker


DREW BECKER
PRIMARY EXAMINER

Conferees:

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